IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 14, 2005 Session

DAVID W. MOORE, ET AL. v. CITY OF CHATTANOOGA

Appeal from the Circuit Court for Hamilton County
No. 03C962 Jacqueline Schulten, Judge

No. E2004-02869-COA-R3-CV - FILED NOVEMBER 18, 2005

David W. Moore and Sandra Moore sued the City of Chattanooga ("the City") after a truck owned by the City and driven by a City employee rear-ended Mr. Moore's car. The case went to trial and the City stipulated to liability, among other things. After a bench trial, the judgment was entered awarding, *inter alia*, Mr. Moore $40,000 in lost income and $46,000 for his personal injuries. Mrs. Moore was awarded $20,000 for loss of consortium. The City appeals claiming that the awards for lost income, personal injuries, and loss of consortium are excessive and not supported by the evidence. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

D. Marty Lasley, Chattanooga, Tennessee, for the Appellant, City of Chattanooga.

Thomas L. Wyatt, Chattanooga, Tennessee, for the Appellees, David W. Moore and wife, Sandra Moore.

OPINION

Background

Mr. and Mrs. Moore sued the City and Willie Birdsong regarding an accident that occurred on June 14, 2002. This non-jury case was tried in September of 2004. At trial, the City stipulated that:

> The collision which forms the basis of this action was caused by the negligent acts of City Employee Willie Birdsong while driving a truck owned by the City of Chattanooga in the course and scope of his employment by the City of Chattanooga. The City of Chattanooga is vicariously liable to [Mr. Moore] for any damages the court awards [Mr. Moore] in compensation for the injuries he sustained in the subject collision ….

The suit against Willie Birdsong was dismissed. The City also stipulated that Mr. Moore incurred charges for medical treatment of the injuries received in the collision in the approximate total amount of $11,502.50.

Mr. Moore testified at trial. He described the day of the accident as "a sunshiney, pretty day … a clear day." Mr. Moore explained that he left his shop at 4:30 or 5:00 p.m. driving a 1995 Nissan Altima in good condition and was traveling on Lee Highway when he "noticed a one-ton truck, white one-ton truck that had an orange light flashing on the top. It was erratically weaving in and out of traffic. It was passing everything that was in front of him." Mr. Moore testified that because he wanted to get away from the truck, he decided to get on the interstate and turned on to the interstate entrance ramp. Mr. Moore explained that there were three cars ahead of him on the entrance ramp and that two of these cars were able to merge out immediately. Mr. Moore testified that the car directly in front of him pulled up parallel to the interstate and stopped. Mr. Moore testified that he stopped approximately two car lengths behind the car ahead of him and leaned forward and "looked back to my left to view the oncoming traffic to try to determine when I would be able to merge out." Mr. Moore testified that he was sitting for a minute or a minute and a half waiting for an opportunity to pull out into the heavy traffic. He stated: "Then I was struck violently from the back without any warning or anything. I didn't see or hear the truck coming." The vehicle that hit him was the same one-ton truck he had tried to get away from. Mr. Moore testified that he returned to the accident site several hours after the accident and measured the skid marks made by the truck and that they were 66 feet long. The skid marks made by his vehicle measured 21 feet.

Mr. Moore, who was 55 years old at time of trial, testified that he was "very healthy" before the accident and never had any treatment for, or complaints of back or neck pain. He described his symptoms after the accident stating: "Immediately my neck was burning, the back of my neck from the base of my skull down. It was burning like it was on fire. I thought I had damaged my neck." He testified that after he was struck, he got out of his car and "[a]t that point my neck was

the only thing. At that point I didn't feel like it was that severe. It kept continuing to burn." Mr. Moore was taken to the hospital by ambulance. X-rays taken at the hospital revealed nothing broken. Mr. Moore was in the hospital for approximately two hours and then was released.

Mr. Moore testified that by the next morning, it was difficult to get out of bed and once he got up, he experienced pain in his left hip and down his left leg. The pain continued and Mr. Moore sought treatment. He eventually was diagnosed with two herniated disks in his lower back. He underwent physical therapy for approximately two months in the fall of 2002. Mr. Moore testified that during the course of physical therapy, "[t]he pain that I had actually transferred to my left hip and leg to my right hip and right leg. It went down to my knee and not like it had on the left side." Mr. Moore testified that he again underwent physical therapy in late 2003. Mr. Moore described his symptoms stating: "Initially after the physical therapy they primarily stayed the same. Changed from my right side to my left side. It wasn't going all the way out my toe like it was. It was pretty much severe pain in my right hip and right leg." When asked about his current symptoms, he stated:

> Pretty much the same. It's actually back into my left hip and leg now. I don't understand why it's changed back and forth, but it has. Occasionally, I'll have pain for no reason in my right hip and leg, but primarily the pain is in my left hip and leg.

Mr. Moore testified that currently he uses "some pain medication and some muscle relaxers to help me sleep at night."

Mr. Moore received treatment from Dr. Nicholas Salt, a general practitioner. Dr. Salt referred Mr. Moore to Dr. Barry Vaughn, an orthopedic surgeon. Dr. Vaughn saw Mr. Moore for the first time on September 17, 2002. Dr. Vaughn's diagnosis of Mr. Moore "was a lumbar sprain, lumbar disk protrusion and lumbar degenerative disk disease...." Dr. Vaughn's treatment for Mr. Moore included anti-inflammatory medication, physical therapy, and pain medication. Without going into specific details, Dr. Vaughn's testimony supported Mr. Moore's position that his injuries and related symptoms were the result of this vehicular collision.

David W. Gaw, M.D., a physician specializing in orthopaedics, then evaluated Mr. Moore and diagnosed degenerative lumbar disk disease. Dr. Gaw opined that the accident in question was the most likely cause of Mr. Moore's condition. Dr. Gaw assigned Mr. Moore a "7 percent whole person impairment" rating and opined that there was no curative treatment. Dr. Gaw testified that the best approach would be to treat Mr. Moore's symptoms with a maintenance type of treatment involving things such as anti-inflammatory medications and an exercise program to control pain. Dr. Gaw also stated that Mr. Moore should exercise "some common-sense restrictions such as not lifting more than 50 to 60 pounds occasionally, 20 to 30 frequently, and avoid frequent twisting, bending or awkward positions."

Mr. Moore testified that he has been in the automobile repair business for approximately ten years and is the sole proprietor of his own shop. Mr. Moore testified that prior to this accident, he did large repairs, repairing engines and replacing transmissions, all of which involved a lot of heavy lifting and bending. He testified that prior to this accident, he never had any problems doing these type repairs. Mr. Moore testified that his income in 2002 was $15,452 prior to the accident and $3,225 after the accident. He explained that during the first six months of 2002, he did large repairs and that during the second six months, after the accident, he could do only smaller repairs like tune-ups and brake work that did not require much lifting. Mr. Moore testified that his business goal was to make money and to pay for his building, which he could later sell to use for his retirement. He testified that he had six years left on his mortgage and that he had planned to work until he was 62 or 65. Mr. Moore testified that he refinanced his loan in February of 2002, and that he incurred expenses in connection with this refinancing. Mr. Moore explained that his business was less productive in 2003, the year after the accident, because the injury to his back prevents him from doing the large repairs that he had been able to do before the accident. Mr. Moore testified: "When I did one it would take a lot longer to do those repairs." He testified that he experiences increased back pain with any prolonged lifting or bending. Mr. Moore testified that he put his business up for sale in 2003 and will not be able to use it for his retirement because he is no longer making the money he needs to make. When asked, Mr. Moore testified that he did not seek employment with any car dealerships after the accident and explained that he could not "do the lifting or the prolonged standing, you know, leaning over the hood and that type of work [that would be required at a dealership]. I can't do that for long periods of time."

An exhibit introduced at trial shows that Mr. Moore's automotive repair business had gross income prior to the accident in 1999 of $26,890; in 2000 of $30,552; and in 2001 of $28,847. The gross income for Mr. Moore's business during 2002, the year the accident occurred, was listed as $18,347, and the gross income for 2003 was shown to be $13,838.

Mr. Moore testified that he can't do things around the house like he did prior to the accident. He stated: "after I get off the mower I can't straighten up. It takes me a while to straighten up after I get off the mower." Mr. Moore also testified that before the accident he and his wife supplemented the heating of their home by burning wood that he would cut and split, but that he is no longer able to do this. Mr. Moore also testified that he and his wife liked to walk a lot prior to the accident and that he is no longer able to do that. He stated: "I can't stay on my feet for long periods of time. I have to sit down and rest." He further explained that walking is limited to "[o]nly like a mile now. Normally before when we walked, we'd walk, what, two and a half to three miles. Now I have to sit down and rest." Mr. Moore testified that prior to the accident, he and his wife would go to Florida for vacations and walk on the beach and that he would attend a number of classic car shows where he would spend "three days walking and looking at cars and vehicles," but since the accident he is no longer able to do these things.

Sandra Moore also testified at trial. She and Mr. Moore have been married for 33 years. Mrs. Moore testified that prior to the accident, her husband

> has always been able to do everything around the house. He has always done all of the maintenance to the house and yard work, and he has always been able to cut and stack wood for fire, cutting and stacking it during the winter.…He has always been very active.

She testified that since the accident, "[h]e has a lot of problems when he does anything physical." Mrs. Moore testified that at night, her husband has pain and trouble sleeping. She testified that "[h]e often has to get up and go lie in the floor [at night]. He seems to get more relief from lying in the floor." Mrs. Moore also testified that for recreation, she and her husband like to walk. She stated: "That's the bulk of our recreation unfortunately." Mrs. Moore testified that prior to the accident, her husband never had any problems walking. She stated that now "we don't walk as often. He doesn't feel like it. He can't keep up with me, which I'm really fast. It's just more painful for him. He limps at times."

The Trial Court entered its judgment[1] on October 8, 2004, awarding Mr. Moore "$46,000 to compensate personal injuries," more specifically "for pain and suffering, medicals, loss of enjoyment of life, the disability at 7 percent to the body as a whole the doctor gave him…," and "$40,000 in lost income...." The Trial Court found that the proof showed that Mr. Moore had lost approximately $20,000 since 2002 and that it was "reasonably anticipated he will lose $20,000 for the next two years…" at which time it was "reasonable to anticipate his business will sell at quite a nice profit and that it is a reasonable sum and not speculative for past and future earnings lost." The Trial Court further found that no proof had been presented that Mr. Moore could do other jobs or could have been trained to do other jobs. The October 8, 2004 judgment also awarded Mrs. Moore $20,000 for loss of consortium. The City appeals to this Court.

Discussion

The City raises three issues on appeal: 1) whether the Trial Court erred in awarding personal injury damages of $46,000; 2) whether the Trial Court erred in awarding loss of income damages of $40,000; and, 3) whether the Trial Court erred in awarding loss of consortium damages of $20,000.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

[1]The October 8, 2002 judgment contained a clerical error that was corrected by an Amended Judgment entered December 13, 2004. The correction states that Mr. Moore is awarded $40,000 in lost income and $46,000 to compensate for personal injuries. Our discussion of the judgment utilizes the corrected amounts.

"When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings." *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn.1998)).

The City concedes that damages should be awarded in this case, but contends that the amounts awarded are excessive. The City requests a remittitur and suggests that an award of $35,000 for personal injury, of $5,000 for lost income, and of $5,000 for loss of consortium would be reasonable.

We first consider whether the Trial Court erred in awarding personal injury damages in the amount of $46,000. Mr. Moore testified that after the accident: "Immediately my neck was burning, the back of my neck from the base of my skull down. It was burning like it was on fire. I thought I had damaged my neck." The evidence shows that Mr. Moore experienced pain in his left hip and down his left leg the day after the accident and that Mr. Moore still experiences pain. He was diagnosed with two herniated disks in his lower back and has undergone several courses of physical therapy. Mr. Moore testified that during the course of physical therapy, "[t]he pain that I had actually transferred to my left hip and leg to my right hip and right leg. It went down to my knee and not like it had on the left side." Mr. Moore described his symptoms stating: "Initially after the physical therapy they primarily stayed the same. Changed from my right side to my left side. It wasn't going all the way out my toe like it was. It was pretty much severe pain in my right hip and right leg." He also described his current symptoms, stating they are:

> Pretty much the same. It's actually back into my left hip and leg now. I don't understand why it's changed back and forth, but it has. Occasionally, I'll have pain for no reason in my right hip and leg, but primarily the pain is in my left hip and leg.

The evidence further shows that Mr. Moore currently uses pain medications and muscle relaxers to help him sleep and that he often has to get out of bed and lie on the floor to get relief from his pain. The evidence also shows that Mr. Moore was assigned a "7 percent whole person impairment" rating by Dr. Gaw. Dr. Gaw also testified there is no curative treatment available to Mr. Moore. The evidence shows Mr. Moore's condition will need to be treated symptomatically to address his complaints of pain. The evidence further shows that Mr. Moore experiences pain after attempting activities of daily living and that the pain has effected his ability to walk with his wife for recreation and to attend classic car shows. The evidence further shows that Mr. Moore can no longer lift or bend like he used to and that this has effected his ability to pursue his chosen profession. The evidence also shows that Mr. Moore incurred charges for medical treatment of the injuries received in the collision in the approximate total amount of $11,502.50.

The City argues that the award of $46,000 for personal injuries is excessive and that an award of $35,000 would be more appropriate. It is clear that the Trial Court found Mr. and Mrs. Moore and their witnesses to be credible, and because of this the Trial Court's findings of fact are entitled to considerable deference from this Court. We have carefully reviewed the evidence and

cannot say that the evidence preponderates against the Trial Court's factual findings. We also cannot say that the evidence preponderates against the award of $46,000, but in favor of an award of $35,000. We, therefore, affirm the award to Mr. Moore of "$46,000 to compensate personal injuries...."

We next consider whether the Trial Court erred in awarding loss of income damages in the amount of $40,000. An exhibit introduced at trial shows that Mr. Moore's automotive repair business had gross income prior to the accident in 1999 of $26,890; in 2000 of $30,552; and in 2001 of $28,847. The gross income for Mr. Moore's business during 2002, the year the accident occurred, was listed as $18,347, and the gross income for 2003 was shown to be $13,838. Mr. Moore testified that in 2002, he had income of $15,452 prior to the accident, and $3,225 after the accident. The evidence further shows that Mr. Moore's income has been reduced since the accident because he is no longer able to do large automotive repairs as he did prior to the accident and that he has had to put his business up for sale because he is unable to make enough money at it since the accident.

The City argues that Mr. Moore failed to mitigate his damages by seeking other employment. When asked if he had tried to find employment at a dealership, Mr. Moore testified he could not "do the lifting or the prolonged standing, you know, leaning over the hood and that type of work [that would be required at a dealership]. I can't do that for long periods of time." The Trial Court found that no proof had been presented that Mr. Moore could do other jobs or could have been trained to do other jobs. The evidence does not preponderate against this finding.

The Trial Court stated that the proof showed that Mr. Moore had lost approximately $20,000 since 2002 and that it was "reasonably anticipated he will lose $20,000 for the next two years…" at which time it was reasonable to anticipate that his business would sell for a profit. The evidence does not preponderate against the Trial Court's findings and, therefore, we affirm the award of $40,000 for loss of income.

Finally, we consider whether the Trial Court erred in awarding loss of consortium damages of $20,000. This Court has defined consortium as follows:

> "the conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection and aid of the other in every conjugal relation" … loss of services is a part of the loss of consortium….

Jackson v. Miller, 776 S.W.2d 115, 116-17 (Tenn. Ct. App. 1989) (quoting *Manning v. Altec, Inc.*, 488 F.2d 127, 132 (6th Cir. 1973)).

The evidence shows Mr. Moore used to supplement the heating of his home by burning wood that he would cut and split, but that he is no longer able to do this. Mr. Moore also testified that he and his wife liked to walk a lot prior to the accident and that he is no longer able to do that with her. He stated: "I can't stay on my feet for long periods of time. I have to sit down and

rest." He further explained that walking is limited to "[o]nly like a mile now. Normally before when we walked, we'd walk, what, two and a half to three miles. Now I have to sit down and rest." Mrs. Moore testified that walking was "the bulk of our recreation unfortunately." She testified that prior to the accident, her husband never had any problems walking. She stated that now "we don't walk as often. He doesn't feel like it. He can't keep up with me, which I'm really fast. It's just more painful for him. He limps at times." The evidence shows that prior to the accident, Mr. and Mrs. Moore would go to Florida for vacations and walk on the beach and also would attend classic car shows and walk around to view vehicles. Mrs. Moore testified that since the accident, her husband "has a lot of problems when he does anything physical."

We note that the City concedes that Mrs. Moore is entitled to an award of damages for her consortium claim, and argues only that the amount awarded was excessive. We have carefully reviewed the evidence in the record and find that the evidence does not preponderate against the Trial Court's findings relative to loss of consortium. We, therefore, affirm the award of $20,000 for loss of consortium.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, the City of Chattanooga.

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D. MICHAEL SWINEY, JUDGE